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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY CURTIS MCCARTER,

Defendant and Appellant.

E048189

(Super.Ct.No. SWF021511)

OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. (Retired judge of the Riverside Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant, Tony Curtis McCarter, pled guilty to forging a real estate document (Pen. Code, § 115) in 2007 and was placed on formal probation for three years. He

appeals an order denying his motion to withdraw his plea and dismiss the complaint.
(Pen. Code, § 1203.4.)

BACKGROUND

In 2006, defendant was a real estate agent who provided clients for a broker named Henrietta Jones. Defendant introduced Eleanor Bilbrew, who was going through a divorce from her husband, Johnnie Bilbrew, Jr., to Henrietta Jones. However, because the dissolution was not final, in order to complete the real estate sales transaction, Henrietta Jones informed Eleanor Bilbrew that it would be necessary for her husband to execute an intra-spousal transfer deed. Mrs. Bilbrew informed the broker that her husband would never agree to execute such a document.

To complete the transaction, defendant executed the intra-spousal transfer deed, which was notarized by Maurice Jones, who was Henrietta Jones's husband. When recorded, a copy of the document was sent to Johnnie Bilbrew, Jr., who reported the forgery of his signature on the deed to authorities. Defendant was arrested along with Henrietta Jones and Maurice Jones, and all were charged with forging an instrument which was recorded (Pen. Code, § 115, count 1), as well as forgery of the deed with intent to defraud. (Pen. Code, § 470, subd, (a), count 2.)

On July 12, 2007, at the felony settlement conference prior to the preliminary hearing, defendant pled guilty to count 1, in return for dismissal of the remaining charges and an agreement he would serve no more than one year in county jail. On August 23, 2007, defendant was placed on formal probation on the condition that he serve 180 days in county jail, on weekends.

However, defendant failed to appear for his weekend commitment after completing only seven days. His probation was revoked on February 15, 2008, but was reinstated on March 4, 2008, after he admitted the violation. On April 18, 2008, another notice to appear on an alleged violation of probation was issued when the weekend program turned defendant away. The “turn away letter” indicated that defendant’s work schedule conflicted with the Weekend Release Program. On May 28, 2008, defendant admitted he had failed to appear at the work release program. Probation was reinstated with a modification increasing his jail time from 180 days to 240 days, which he could serve on weekends.

Defendant completed his jail time on January 13, 2009. On February 17, 2009, he made a motion for early discharge from probation, to withdraw his guilty plea and dismiss the complaint. (Pen. Code, § 1203.4.) The motion was denied on March 3, 2009, and defendant appealed.

DISCUSSION

Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493] setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting that we undertake an independent review of the entire record. We offered defendant an opportunity to file a personal supplemental brief, but he has not done so. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

Pursuant to Penal Code section 1203.4, subdivision (a), a defendant is entitled to have his record expunged after the period of probation has terminated if he comes within one of three factual situations: (1) has fulfilled the conditions of probation for the entire period of probation, (2) has been discharged prior to the termination of the period of probation, or (3) the court, in the exercise of its discretion, determines he should be granted relief. (*People v. McLernon* (2009) 174 Cal.App.4th 569, 573.) In such cases, the defendant may be permitted to withdraw his or her plea of guilty and enter a plea of not guilty and the accusatory pleading will be dismissed. (Pen. Code, § 1203.4, subd. (a).) In the first two situations, where the defendant has completed the entire period of probation or has been discharged from probation prior to termination, the defendant is entitled to relief. (*People v. Field* (1995) 31 Cal.App.4th 1778, 1787, quoting *People v. Butler* (1980) 105 Cal.App.3d 585, 587.) If the petitioner comes within the third situation, relief is entirely discretionary. (*People v. Mgebrov* (2008) 166 Cal.App.4th 579, 587.)

Here, the defendant was not discharged early from probation and had not fulfilled the conditions of probation for the entire period of probation, so he was not entitled, as a matter of right, to relief under section 1203.4. We are aware the defendant also requested early discharge from probation in his motion to withdraw his plea, but in light of his two violations of probation, the court was not required to grant him an early discharge. Since defendant did not complete the probationary period and was not discharged from probation, the decision to grant or deny relief was wholly within the court's discretion. Given the defendant's two failures to appear to serve his weekend jail commitment, we

cannot find that the court's decision to deny relief was unreasonable. Additionally, nothing in Penal Code section 1203.4 permits a defendant to withdraw his plea simply because he has served half his probationary period.

We have completed our independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.